

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

GENE L. VAN PELT,)	CASE NO. 5:04CV00063
Plaintiff)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
JO ANNE B. BARNHART, Commissioner of Social Security,)	By: B. Waugh Crigler U. S. Magistrate Judge
Defendant)	

This challenge to a final decision of the Commissioner which denied plaintiff's claim for a period of disability and disability income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. For the reasons that follow, the court will recommend that an order enter REVERSING the Commissioner's final decision, GRANTING judgment to the plaintiff and RECOMMITTING the case solely to calculate and pay proper benefits.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge found that plaintiff, who was 51 years old with two years of college education at the time of the hearing, met the special earnings requirements of the Act on the alleged date of disability onset and continued to meet them through the date of his decision. (R. 12, 18, 289.) He further found that the medical

evidence established that plaintiff suffered and affective disorder which was a severe impairments but not sufficiently severe to meet or equal the requirements of any listed impairment. (14-16, 18.) He also concluded that plaintiff's allegations about the effects of his impairments were not totally credible, and that he possessed the residual functional capacity to perform work involving simple repetitive tasks and limited social interchange. (R. 16-18.) The Law Judge was of the view that plaintiff's past relevant work as a picture framer did not require him to function beyond his residual functional capacity, and that plaintiff could perform his past relevant work. (R. 17-19.) Accordingly, he concluded that plaintiff was not disabled under the Act. The Appeals Council found no basis upon which to review the Law Judge's decision, denied review, and adopted the Law Judge's decision as the final of the Commissioner. (R. 4-5.) This action ensued.

Plaintiff's offers in his Memorandum supporting his motion for summary that the conclusions that plaintiff could perform his past relevant work, and that plaintiff's impairment did not meet the requirements of the Listings, 20 C.F.R. § 404,1525, Appendix 1, §12.04, are not supported by substantial evidence. It is the undersigned's view that both contentions are meritorious.

There is no gentle way to put it. The Law Judge's own findings reveal that he disregarded the evidence submitted from every medical source, whether treating, consultative or record reviewing, and decided from what he denominated as the "totality of the evidence," that plaintiff possessed the functional capacity to perform his past relevant work. He gave "little weight" to the Commissioner's consultative examining psychologist, Joseph Cianciolo, PhD. who essentially opined that plaintiff was markedly compromised in his ability to function and unable to perform the routine duties of his job, mainly because of his inability to maintain regular attendance and his inability to perform detailed or

complex tasks . (R. 17, 121-123.) The Law Judge gave “little weight” to the evidence of plaintiff’s treating doctor, Michael Hoffman, M.D., who was seeing plaintiff on a regular monthly basis, and who opined that unless and until proper medications could be found, plaintiff was not able to organize his behavior and activities, had been forced to close his framing shop because of his condition and was disabled from gainful employment. (R. 17, 138.) Interestingly, the Law Judge also gave “little weight” to the DDS review reports who determined that plaintiff did not suffer a severe impairment. (R. 17, 124-136.) Relying on the regulation which provides that the Law Judge is “responsible for assessing ...[a claimant’s] residual functional capacity,” the Law Judge then decided the issue on his own. *See* 20 C.F.R. § 404.1546. The problem, of course, is that while the Law Judge did decide the issue on his own, his decision did not have medical evidentiary support.

Moreover, the Law Judge’s determination of plaintiff’s functional capacity had no other substantial evidentiary support. Contrary to how the Law Judge viewed the plaintiff’s evidence, plaintiff’s daily activities were insufficient to support his findings. Yes, plaintiff’s daily activities reveal that he is able to function in a context outside the workplace, but they do not reveal that plaintiff could carry out the same functions on a sustained basis as is required in a vocational setting. Both the lay and medical evidence clearly demonstrate that he could not.

Nor did the vocational expert (VE) provide evidence substantially supporting the Law Judge’s functional capacity assessment. While the VE indicated that plaintiff’s past work could be described as involving simple, repetitive tasks, nonetheless it was semiskilled. (R. 288.) As plaintiff points out in his memorandum, when a job is semiskilled, by definition, it goes beyond “simple.” The Law Judge’s use of the two terms in the same breath is incongruous. In any event, after plaintiff further explained his work,

and notwithstanding an indication that plaintiff had presented nothing that would demonstrate any functional limitation which would preclude plaintiff's past work, the VE acknowledged that "competitive work requires the ability to maintain work on a regular..." basis. (R. 290.) In addition, he acknowledged that regular attendance would be required, and that flexibility on the part of employers in this regard would be "limited." (R. 292.)

It is in this testimony that the true merits of plaintiff's claim actually are revealed. To put it bluntly, if the Law Judge had continued the sequential evaluation beyond the past relevant work level, it is clear that the extant vocational evidence would have compelled a finding that plaintiff was disabled. At the very least, there is insubstantial evidence to support the Law Judge's functional assessment in the face of all the acceptable medical and all the other lay evidence to the contrary.

Much the same is true about the Law Judge's resolution of the Listings question. There was no basis upon which the Law Judge could give "little weight" to all the medical evidence, yet then determine that plaintiff's impairment did not meet or equal the requirements of the Listings, unless the Law Judge was exercising expertise he did not possess. If the treating and consulting medical sources had been given any weight, as they should have been given under the Commissioner's own regulations, 20 C.F.R. §§ 404-1527-1529, then, when read in combination, both Drs. Cianciolo and Hoffman report levels of severity meeting or equally the requirements of §12.04A and §12.04B of the Listings.¹

In sum, the undersigned cannot find that the Law Judge's decision concerning plaintiff's residual functional capacity and, thus, his ability to perform his past relevant work, is supported by substantial

¹Dr. Cianciolo repeatedly uses the terms "marked" or "significant" to characterize plaintiff's limitations, and the persistence of plaintiff's condition and symptoms is revealed by the monthly visits to Dr. Hoffman.

evidence. On this record, such a conclusion would compel the award of benefits because if plaintiff cannot perform his past relevant work, the vocational evidence demonstrates he is disabled. Furthermore, the undersigned does not believe the Law Judge's finding that plaintiff's impairments fail to meet or equal the requirements of the appropriate Listing is supported by substantial evidence. Rather, the substantial evidence is that his mental impairment does meet the requirements of 20 C.F.R. § 12.04, and that he should be awarded benefits as a matter of law.

Accordingly, the undersigned hereby RECOMMENDS that an order enter REVERSING the Commissioner's final decision, GRANTING judgment to the plaintiff and RECOMMITTING the case to the Commissioner for the sole purpose of calculating and paying proper benefits.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date

